STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2003
v	No. 237199 Wayne Circuit Court
LEE O. ROOKS, Defendant-Appellant.	LC No. 01-4532-02

Before: Fitzgerald, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Defendant appeals his conviction, following a bench trial, on the charges of armed robbery, MCL 750.529, and felony firearm, MCL 750.227b.[1] Defendant was sentenced to 54-240 months' imprisonment for the armed robbery conviction and two years' imprisonment for the felony firearm conviction. We affirm.

I. Facts and Proceedings

Defendant's convictions arise out of an incident on April 1, 2001. Antonio Fluckes testified that on April 1, at approximately 5:30 p.m., he was walking down Park Drive in Detroit to go to the store with his two uncles, Dennis Fluckes and Jose (or John) Fluckes, when a white van "rolled" past them, made a U-turn after driving about one block, pulled up, and stopped next to where Antonio was walking. One of Antonio's uncles saw the sliding door of the van open and started running. Antonio saw one of the van's passengers, Jaravea Nealy, a person he knew from middle school, try to put a black rag over his face. Then, a man who was in the back seat, identified at trial by Antonio as the defendant, jumped out of the van, stood in front of Antonio, and pointed a shotgun at Antonio's head. Antonio testified that, on April 1, defendant was wearing a hat and a black shirt with a hood on it.

When defendant exited the van, Antonio's other uncle ran behind some bushes. Nealy then exited the van and came up to Antonio's back. Defendant went to the corner to see where Antonio's uncle went, and Antonio tried to run away at that point. As Antonio was running, he

[1] Defendant and co-defendant Jaravea Nealy were jointly tried, and Nealy was also convicted of armed robbery, MCL 750.529, and felony-firearm, MCL 750.227b.

slipped, and Nealy caught up to him, told him to give him his money, and patted him down while holding a handgun. Nealy reached into Antonio's pocket and took ten dollars from him, then ran and jumped back into the van. Defendant also got back into the van, and the van pulled off. Antonio said he saw three people in the van.

Officer Antonio Carlisi, a Detroit police officer, testified that on April 1, 2001, he was on duty and received a call regarding a person with a weapon at the corner of Dickerson and Hampshire. When he and his partner arrived at that location, they saw Antonio Fluckes flagging them down. They stopped, and Antonio, in a hysterical state, told them that the perpetrators were two men in a white mini-van. Antonio then continued walking northbound on Dickerson. The officers stopped him again and tried to calm him down so they could get further information. Antonio told them that he had just been robbed and he wanted to go home. He then ran to his house on Maiden Street, about three or four blocks from where the officers encountered him. The officers followed him to his house, where they met Antonio's uncles and spoke with them about the incident. After speaking with the three men, the officers contacted the Street Enforcement Armed Robbery Unit and learned that the Headquarters Surveillance Unit had already set up surveillance on a suspected vehicle. Officer Carlisi relayed that Antonio had said that the second perpetrator, the one with a shotgun, was wearing a light-colored baseball hat and a white jacket.

Investigator James Kraszewski was the Detroit Police Department officer in charge of this case. He testified that on April 1, 2001 he and a group of officers were looking for a white van that had been reported stolen on March 31, 2001, and that had also reportedly been used in a number of armed robberies that day, even prior to the robbery of Antonio Fluckes.

Later that day, around 10 p.m. on April 1, 2001, Investigator Kraszewski and his unit stopped a white van and arrested the driver, Melvin Higginbottom, and one of its passengers, William Sewell. Before Higginbottom was apprehended, he discarded a shotgun while he ran. The shotgun was recovered but was not properly preserved to recover finger prints. The other two individuals in the van ran away. Higginbottom and Sewell told the officers that the two men who escaped were defendant and Nealy. The police arrested Nealy "some time after midnight" and arrested defendant "some time after 4:00 a.m." Both defendant and Nealy were placed in a lineup later that day, and Antonio Fluckes immediately and without hesitation identified both of them as having robbed him.

Nealy gave Officer Kraszewski a statement on April 2, 2001 that said, in part, that four guys had invited him to go smoke some "weed" with them; that he had been in the van Saturday night;[2] and that the shotgun belonged to Melvin Higginbottom. When Nealy gave his statement, however, Officer Kraszewski had not told him that a shotgun had been recovered.

Neither defendant presented any witnesses. In his closing argument, defense counsel noted that Antonio Fluckes was the only person who had identified defendant as being involved with the armed robbery and argued that eyewitness identification is "one of the least favorite forms of evidence." Defense counsel also noted that Fluckes testified that defendant was

[2] April 1, 2001 was a Sunday.

wearing a black hooded shirt, but Officer Carlisi testified that Fluckes told him that the hooded garment was white. Defense counsel also argued that the person who had the shotgun at the time of the arrest was the person who had committed the robbery, rather than defendant. Additionally, he claimed that the officers should have at least tried to test the shotgun for fingerprints, given that Officer Galloway was wearing gloves when he handled the weapon. Finally, defense counsel argued that the evidence was insufficient to support a conviction beyond a reasonable doubt.

In its ruling, the trial court noted that the theories in this case were that each defendant was a principal and that each defendant assisted the other in committing the offense. The trial court believed that this was important because only one weapon, the shotgun, was recovered and identified as having been used in the robbery. The trial court also found that, having had the opportunity to observe Fluckes' demeanor and assess his credibility, the identification testimony was "extremely credible and trustworthy." The trial court found that the lack of fingerprints and the fact that the handgun was not recovered were insignificant, and concluded that it was clear that a robbery had taken place; that both defendant and Nealy were armed when the robbery was committed; and that the defendant possessed a firearm at the time of the robbery. The court found both defendant and Nealy guilty of the crimes charged.

II. Analysis

The evidence was sufficient to support defendant's convictions. "'The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute.'" *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995). Here, as the trial court indicated, the prosecution relied, in part, on an aiding and abetting theory, which permits defendant to be "convicted and punished as if he directly committed the offense." *Turner, supra* at 568.

Defendant argues that "[t]here is no competent evidence of [d]efendant's identity and no competent evidence [d]efendant handled the gun, let alone committed an armed robbery with the weapon." At trial, the evidence showing that defendant was the perpetrator of the crime consisted of Antonio Fluckes immediately picking him out of a lineup just one day after the robbery. Also, the fact that Melvin Higginbottom and William Sewell named defendant as one of the individuals who escaped from the van connects defendant to this crime. Simply put, the trial court believed the victim's testimony. "[T]his Court should not interfere with the [factfinder's] role of determining the weight of the evidence or the credibility of witnesses." *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000).

Additionally, this Court must view the evidence in a light most favorable to the prosecution and resolve conflicts in the evidence in its favor. *Id.* Defendant claims that the inconsistency in the testimony regarding defendant's clothing shows that his identity as the perpetrator cannot be proven beyond a reasonable doubt. However, resolving this conflict in the prosecution's favor requires finding that this discrepancy is not a basis for disturbing the trial court's decision. Defendant also claims that Sewell's and Higginbottom's identification of defendant was self-serving. Again, this is an attack on the weight and credibility the factfinder gave the evidence. Furthermore, even without this identification, the lineup evidence, which the

trial court found credible and accorded significant weight, would be sufficient to identify defendant as the perpetrator of this crime.

Defendant also claims that there was inconsistent testimony by the police officers regarding why the gun was not fingerprinted and asserts that if the gun had been fingerprinted, the results would have shown that defendant did not handle the weapon. Even if defendant's fingerprints had not been found on the weapon, however, defendant's conviction was still supported by the evidence. Fluckes testified that defendant pointed a gun at him, and the trial court concluded that this was the weapon that the police officers recovered after the van was stopped. Given that the competency of the evidence was for the trial court to determine, this evidence was sufficient to support defendant's convictions.

Additionally, the trial court's findings support defendant's conviction under an aiding and abetting theory, because the trial court stated that "it appeared that the defendants acted in concert in committing the armed robbery." Fluckes' testimony showed that although defendant did not take anything from him, Nealy, who stood at Fluckes' back while defendant ran after Fluckes' uncle, chased after Fluckes when he tried to escape, and took ten dollars from him. Therefore, viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to support defendant's convictions.

Defendant also contends that he was denied effective assistance of counsel. We disagree. As this Court stated in *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

> In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Failure to move for a new trial or for a *Ginther* hearing ordinarily precludes review of the issue unless the appellate record contains sufficient detail to support the defendant's claim.

Although defendant failed to request a new trial or request a *Ginther*[3] hearing in the trial court, he filed a motion in this Court seeking remand of this case to the trial court for an evidentiary hearing. This Court denied that motion and, accordingly, our review of defendant's claim is limited to mistakes apparent on the appellate record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002), citing *Sabin*, *supra* at 659.

Defendant claims that his trial counsel was ineffective for failing to call certain witnesses, specifically his mother and Natasha Wallace. We disagree. Defendant now asserts that his mother would have testified that defendant in fact attended school with Antonio Fluckes, contradicting Fluckes' testimony that he did not know defendant. Defendant also asserts that Natasha Wallace was an alibi witness who would have testified that defendant was at her home when the offense took place. However, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court

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[3] *People v Ginther*, 390 Mich 426; 212 NW2d 922 (1973).

will not substitute its judgment for that of counsel regarding matters of trial strategy." *Davis*, *supra.*

Here, defendant has not overcome the presumption of trial strategy. As the prosecution notes, defendant's counsel's strategy was to attack the accuracy and credibility of the identification testimony. Even if it was a mistake for counsel to rely so heavily on this approach, this Court will not use hindsight to evaluate defense counsel's competence. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Moreover, Wallace, who the prosecution says was defendant's girlfriend, likely would have been attacked on the basis of credibility, and defendant's mother's testimony would not have helped defendant, since Antonio Fluckes testified that he did not *recall* having seen defendant before, not that he *never* had seen him before.

Defendant also argues that the "susceptibility of the lineup was not brought out at trial." On the contrary, defense counsel specifically argued that eyewitness identification is a weak form of evidence and that the fact that defendant was picked out of the lineup by Fluckes did not support the conviction. Defendant also states that other court proceedings involving Higginbottom and Sewell showed that the shotgun was, in fact, tested for fingerprints, which was inconsistent with the officers' testimony. Defendant makes no allegation of error against his attorney in this regard, but to the extent that he is claiming that this evidence should have been introduced, defendant does not show how this would have affected the outcome of his case. As stated above, even if his fingerprints were not on the shotgun, there was still sufficient evidence to support defendant's conviction. Therefore, defendant has not shown that his counsel was ineffective.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper